

In recent weeks, my office has received dozens of comments on the Supreme Court nomination process. As you may know, on May 2, 2009, Supreme Court Associate Justice David H. Souter notified the President of his intention to retire at the conclusion of the current term. The President announced his nominee for this vacancy, Federal Second Circuit Appeals Court Judge Sonia Sotomayor, on May 26, 2009.

The event of filling a Supreme Court vacancy is historically infrequent. Thirty-nine of the previous 42 Presidents of the United States have made nominations to the Supreme Court. Over the past 220 years, 122 nominees have been confirmed and appointed to the Supreme Court, while 36 nominees were unconfirmed. Approximately 77 percent of nominees are eventually confirmed. The process by which a Supreme Court nominee is confirmed has at times been complicated, and I would like to provide some information on what to expect in the coming days and weeks.

Our Constitution briefly lays out the process by which a Justice is appointed to the Supreme Court: the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint... Judges of the supreme Court.” This is known as the “Appointments Clause” (Article II, Section 2, Clause 2). The Constitution does not state any specific requirements a prospective Supreme Court judge must meet—the President can nominate anyone he or she chooses. However, the nominee must be approved by the majority of the Senate, which means he or she must meet a certain standard deemed acceptable by each state’s two representatives in the Senate.

The Senate is reviewing Judge Sotomayor’s background and qualifications in a series of hearings. The Senate Judiciary Committee is not constitutionally required to hold these hearings, but in 1868, Senate rules were changed to require nominations be referred to appropriate standing committees, with certain exceptions. Since then, nominees have come before the committee to answer intensive questions about their background and experience, as well as their views concerning various issues and the United States Constitution. One important consideration is the candidate’s judicial temperament, and his or her judicial record. It is interesting to note that seven out of ten of Judge Sotomayor’s rulings that have been appealed to the Supreme Court have later been overturned. I anticipate that Judge Sotomayor will face rigorous questioning on this fact.

While the Constitution does not grant me an official role in the Supreme Court nomination process (although I have spoken to Senator Jeff Sessions of the Senate Judiciary Committee), I have several thoughts I would like to pose for your consideration.

It is important to note that Supreme Court Justices are appointed for life-long terms. The current average age of the U.S. Supreme Court justices is around 69 years, which happens to be the age at which Associate Justice Souter is retiring. With a number of other justices nearing retirement, we may soon see other vacancies on the Court as well. At the time of their appointments, recent Supreme Court Justices were ages 55 (Associate Justice Samuel Alito), 50 (Chief Justice John Roberts), 56 (Associate Justice Stephen Breyer), 60 (Associate Justice

Ruth Bader Ginsburg), and 43 (Associate Justice Clarence Thomas). Judge Sotomayor is 54 years old, just one year older than the average age of her predecessors listed above.

Our Founding Fathers divided the federal government's authority across three branches that each have separate and distinct powers. The Supreme Court, the highest court in the land, heads the judicial branch, which interprets and applies our laws. The powers to make and enforce our laws are bestowed to the legislative and executive branches of government. Occasionally, their authorities intersect, and the judicial branch has often been stronger than another branch. This has sometimes been a good thing, such as with the landmark Supreme Court case, *Brown v. Board of Education*, which was integral to the advancement of basic civil rights in our nation. However, this has also been detrimental to our nation, such as in the infamous *Dred Scott v. Sanford* case, in which the Supreme Court reprehensibly ruled that anyone of African descent, slave or free, could not be a U.S. citizen, had no Constitutional rights, and that Congress could not prohibit slavery.

There is a natural tension between the three branches of government, dating back to *Marbury v. Madison*, when the Supreme Court ruled it had the power to supersede another branch of government via the power of judicial review. There is room for abuse when judicial review is unchecked, as has occurred when unelected activist jurists on the Supreme Court have circumvented the tripartite policy-making process to pursue policies of political activism. Supreme Court justices must be able to table partisan politics and personal political activism, and ground their rulings in the text of the Constitution, most essentially protecting the dignity and rights of all.

These issues will undoubtedly be part of the discussion during the nomination process of Judge Sotomayor. On a side note, you may be interested to know that a Supreme Court Justice has never been appointed from Nebraska. Our Justices have come from 33 states, but none has ever been a Cornhusker. Perhaps when the next Justice retires, a Nebraskan might join the ranks of our nation's highest court.